No. 12046

In the United States Court of Appeals for the Ninth Circuit

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, APPELLEES

UNITED STATES OF AMERICA AND LEE ARENAS, APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, APPELLEES

UPON APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE UNITED STATES AND LEE ARENAS

A. DEVITT VANECH,
Assistant Attorney General.

JAMES M. CARTER,
United States Attorney,
Los Angeles, California.

IRL D. BRETT,
Special Assistant to the Attorney General.
Los Angeles, California.

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice,
Washington, D. C.

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OPINION BELOW

The district court did not write an opinion. Its oral views are set forth in the record at pages 59-66, and its findings of fact and conclusions of law appear in the record at pages 40-48.

JURISDICTION

This suit was originally brought under the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 28

U. S. C. sec. 345,[1] to determine an Indian's right to certain allotments. After judgment was entered for the Indian, his attorneys filed a petition in the case for a supplemental decree making an allowance for attorneys' fees and expenses and impressing a lien upon the restricted allotments to secure payment thereof. For the reasons stated in the Argument, *infra,* pp. 13-31, it is believed that the district court had no jurisdiction to entertain the supplemental petition. Judgment granting the relief sought was entered May 3, 1948 (R. 53). Notice of appeal was filed by the United States on its own behalf and on behalf of the Indian on June 30, 1948 (R. 56).[2] The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

STATUTES INVOLVED

1. The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U. S. C. sec. 345, is as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and

[1] The jurisdictional provisions of this Act were incorporated in the Judicial Code sec. 24(24), 28 U. S. C. sec. 41(24) which was identical in scope with the 1894 Act as amended. *First Moon* v. *White Tail,* 270 U. S. 243, 245 (1926). It is now sec. 1353 of Title 28, United States Code. For brevity, these provisions will be hereinafter referred to as the 1894 Act as amended.

[2] Notice of appeal on behalf of the Indian was also filed by a private attorney on June 2, 1948 (R. 54), and that appeal is also pending under the same docket number.

prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States are party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

2. Pertinent portions of the Mission Indian Act of January 12, 1891, 26 Stat. 712, and of the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, are set forth in the appendix, pp. 32-34, *infra*.

QUESTIONS PRESENTED

1. Whether in a proceeding under the 1894 Act, as amended, brought by an Indian to determine his right to allotments, the district court had jurisdiction to impress a lien upon the restricted allotments to secure payment of adjudged attorneys' fees and expenses in favor of the attorneys for the successful Indian litigant and to enforce such lien by appointing a receiver to collect the income from the property, by sale of the property, etc.; and

2. Whether the district court had jurisdiction to adjudicate any questions as to such attorneys' fees and expenses.

STATEMENT

As a result of litigation which culminated in this Court's decision in *United States* v. *Arenas,* 158 F. 2d 730 (1946), certiorari denied 331 U.S. 842, it was determined that Lee Arenas was entitled to allotments of certain lands in Palm Springs, California. Thereafter, the present judgment was entered awarding his attorneys some 22½% of the value of the allotments as fees and expenses, imposing a lien on the allotments to secure payment thereof and retaining jurisdiction to take further proceedings for the enforcement of such lien by appointment of a receiver or by other means.

The facts relating to the present controversy may be summarized as follows:

The allotted lands are part of the public lands which were originally set aside by a trust patent executed May 14, 1896, as a reservation for the Agua Caliente, or Palm Springs, Band of Mission Indians of California. The Mission Indian Act of January 12, 1891, 26 Stat. 712, contemplated that this reservation as well as others established for other Mission Indians would eventually be allotted in severalty to members of the bands (R. 23-25). Under Section 5 of the Act, *infra,* p. 32, upon approval of the individual allotments by the Secretary of the Interior, trust patents were to be issued in the name of the allottees. The allottees were not, however, authorized to sell or encumber the land, the Act providing that any conveyance of a trust allotment or contract touching the same, made prior to the issuance of the fee patent, would be absolutely null and void. The United States undertook to hold the lands in trust for the allottees for a period of twenty-five years and agreed to convey the lands at the end of that period "in fee, discharged of said trust and free of all charge and incumbrance whatsoever."

Allotments were made from time to time upon various Mission Indian Reservations and in 1923 a schedule of allotments on the Palm Springs or Agua Caliente Reservation was prepared by the allotting agent. This schedule was, however, disapproved by the Secretary of the Interior. Another schedule was prepared which was received by the Department of the Interior in 1927. No action was taken thereon until 1944.

Meanwhile, on December 24, 1940, pursuant to the Act of 1894, as amended, Lee Arenas instituted in the court below an action, *Lee Arenas* v. *United States,* No. 1321 O'C-Civil, for an adjudication of his claims to allotments listed on the 1923 or 1927 schedules on his own account and as the heir of his wife (Guadaloupe), his father (Francisco), and his brother (Simon) (R. 6, 164-165).

The Government's motion for summary judgment was granted on March 6, 1942, and on June 30, 1943, this Court affirmed on the basis of the decision in *St. Marie* v. *United States,* 108 F. 2d 876 (C.C.A. 9, 1940). *Arenas* v. *United States,* 137 F. 2d 199. The Supreme Court reversed (*Arenas* v. *United States,* 322 U.S. 419 (1944)), and upon the subsequent trial the district court found that Arenas was entitled to the allotments selected by himself and his deceased wife, father and brother, and that the trust patents should be effective as of June 21, 1923. *Arenas* v. *United States,* 60 F. Supp. 411 (S. D. Cal., 1945). At this time the district court reserved jurisdiction for the purpose of adjudicating the reasonable sums that should be allowed to his attorneys for services and expenses incurred in the prosecution of his claims (R. 13). On appeal, this Court modified the judgment with respect to Arenas' own allotment and that of his wife by making the effective date of the trust patents May 9, 1927, and reversed the judgment insofar as it found Arenas

entitled to the allotments selected by his father and brother. *United States* v. *Arenas,* 158 F. 2d 730 (C.C.A. 9, 1946), certiorari denied 331 U.S. 842 (1947).

On that appeal, the United States objected to the provision of the judgment which reserved jurisdiction for the purpose of determining sums to be allowed and paid as attorneys' fees and expenses and for the purpose of making appropriate orders for the securing and payment of such sums. As to this objection, this Court stated (158 F. 2d at p. 753):

> The appellant objects that "Presumably, it was intended that thereafter judgment would be entered against the United States for such expenses," and points out that the Act of 1894, supra, "by which the United States consented to this suit, does not authorize the imposition of liability for costs or other expenses of litigation against the Government."
>
> We agree entirely with the appellant's construction of the Act of 1894 [25 USCA § 345]. The difficulty with the appellant's argument, however, is that it has no application to the case at bar.
>
> The judgment of the court below seeks to impose no liability for any expenses of litigation upon any one, certainly not the United States. The appellant does not question the court's right to leave the case open for such future action as it may deem proper: the objection is that "presumably" the lower court is planning to mulct the Government for the appellee's attorneys' fees.
>
> There is neither internal nor external evidence that the judgment reflects any such intention, or any other unlawful or unfair intention. So far as the appellant is concerned, any objection to this paragraph of the judgment is not only premature,

but moot. For this reason, this Court refrains from making any ruling on the subject.

On October 24, 1947, appellees, attorneys for Arenas in the prosecution of his claims, filed in the allotment proceeding a petition for a supplemental decree for attorneys' fees, etc. (R. 2-12). The petition alleged the employment of appellees on a *quantum meruit* basis (R. 3) and the nonpayment for services rendered and for moneys advanced as expenses in the amount of $258.67 (R. 5-6). It also alleged that the lands involved had a value in excess of $1,000,000, and that, if properly managed, they should produce an annual income in excess of $20,000 instead of $7,500 as at present (R. 5, 9-10). In consideration of the work involved in prosecuting the claims as outlined in the petition (R. 6-9), it was alleged that 33-1/3 per cent of the value of the lands involved would be a reasonable fee (R. 10). Petitioners asked for an order requiring the United States and Arenas to show cause why the relief sought should not be granted. The relief requested was (1) that appellees have judgment against Arenas in an amount equal to 33-1/3 per cent of the land value as fees for services and in an additional amount for advances; (2) that a lien be impressed upon the lands involved to secure the amounts found due; (3) that a portion of the property sufficient to satisfy the judgment be sold, free from any restrictions upon alienation and that the balance of the proceeds of the sale, if any, be distributed to the plaintiff, or otherwise disposed of as the Court may direct, and (4) if the property be not ordered sold, a receiver be appointed to manage the property and to pay the net income to the plaintiff and to petitioners as the Court may direct.

Also on October 24, 1947, the district court issued an order, directed to Arenas alone, to show cause why

the prayers of the petition should not be granted (R. 13-14). On December 16, 1947, the United States, appearing specially, moved to dismiss the show cause order in so far as it and the underlying petition were directed toward the issuance of any order affecting in any way the restricted allotments or the management thereof, on the grounds that, since title to the lands was in the United States, it was an indispensable party and had not consented to such jurisdiction (R. 15-17). On December 31, 1947, this motion to dismiss was denied (R. 27). On February 9, 1948, the United States, appearing specially on its own behalf and generally on behalf of Arenas, filed an answer (R. 28-38), alleging its governmental interest in the enforcement of the restrictions against alienation of the allotments (R. 28-29), and praying that, if appellees were entitled to any relief, it be limited to a personal money judgment against Arenas (R. 37).

After trial (R. 39, 59-116), on March 31, 1948, the court announced its decision that appellee attorneys were entitled to fees for services rendered and to reimbursement for costs advanced, and that a lien would be impressed upon the allotments and proceeds therefrom as security (R. 64-66). The court reasoned that by the 1894 Act, as amended, the United States had consented to the exercise of full equitable jurisdiction, including a proceeding in the nature of a supplemental bill for the taxation of costs between solicitor and client, and that, having jurisdiction to render relief in the main action, i.e., the suit to determine entitlement to allotments, the court had jurisdiction to affect the allotted lands (R. 59-62, 66). On May 3, 1948, findings of fact and conclusions of law were filed (R. 40-48), in which it was found, among other things, that the value of the allotted lands was uncertain but, nevertheless, very substantial (R. 42). Also on May 3,

1948, judgment was entered (R.49-53). The judgment provided for recovery from Arenas of 22½ per cent of the value of the allotted lands as fees for services rendered and $258.67 as reimbursement for costs advanced (R. 50-51). It also provided that payment of the award would be secured by an equitable lien upon the allotments, including "the entire interest in said lands in the hands of the United States of America," and upon 22½ per cent of the income therefrom in excess of the reasonable operating expenses of the property (R. 51-52). Although the value of the award in money was unascertainable (R. 42), and hence could not be paid, Arenas was granted a period of three months to satisfy the lien during which time proceedings to enforce it would be stayed (R. 52). The court retained jurisdiction in order to determine the time when, manner in which, and method whereby, payment of the award might be made or further secured, to compel the satisfaction or enforcement of the lien, and, if necessary, to determine the money value of the services rendered and to appoint a receiver to effectuate the judgment (R. 53). This appeal followed (R. 56).[3]

The same questions are now pending before this Court in another case entitled *United States, et al.* v. *Preston, et al.,* No. 12,218. That case involves a similar award to attorneys who represented Eleuteria Brown Arenas in her successful suit to establish her right to an allotment. The judgment in that case, after

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[3] Lee Arenas has also appealed through private counsel (R. 54). That attorney, Mr. John J. Taheny, subsequently was replaced and by order of this Court entered December 15, 1948, pursuant to stipulation, Mr. Taheny's fees and expenses were fixed at $4,960.98, the order including a provision imposing a lien upon the interest of Lee Arenas in the allotted lands (R. 205-207). No notice of the stipulation or order was given to the United States prior to entry of the order.

awarding 12½ per cent of the value of the allotment and $100 expenses, imposed a lien on the property, ordered the premises sold and directed that the proceeds, after expenses of the sale, be divided between the attorneys and Eleuteria Brown Arenas.

SPECIFICATIONS OF ERRORS

The statement of points relied upon by the United States on its appeal (R. 57, 204) is as follows:

1. The court erred in denying the Government's motion to dismiss the petition and order to show cause.

2. The court erred in finding, concluding and adjudging that appellees were entitled to an equitable lien upon the restricted allotments involved and the income derived therefrom to secure the payment of attorneys' fees and moneys advanced as costs and expenses of suit, and in failing to find and conclude that it was without jurisdiction to impose such a lien.

3. The court erred in retaining jurisdiction in order to compel the satisfaction, discharge or enforcement of the equitable lien, and to appoint a receiver or commissioner to effectuate the judgment.

SUMMARY OF ARGUMENT

I

A. By various statutory enactments, designed to effectuate its policy of guardianship over Indians, Congress has clearly provided that trust allotments, such as those here involved, should be kept intact for the allottee until the termination of the trust and should in no way be used to satisfy debts of the allottee contracted prior to that time. Also, Congress provided that any attempted conveyance of the land would be absolutely null and void. Hence although the Indian is the beneficial owner, the United States is vitally interested in any proceedings which might affect the

property. In fact, in suits concerning the allotments, the interest of the United States predominates over that of the Indian owner.

B. In view of the governmental interest in the property, the imposition of a lien to secure payment of attorneys' fees constitutes an attempt to impose liability for such fees upon the United States. This Court in *United States* v. *Arenas,* 158 F. 2d 730 (1946), recognized that the imposition of such liability was not permitted by the 1894 Act. And, since public policy forbids the granting of liens upon public property in the absence of statutory authorization, it follows that the court below had no jurisdiction to impose a lien upon the restricted property.

C. The Act of 1894 was a consent of the United States to suit for the limited purposes stated in the statute and made no provision for adjudication of claims for attorney's fees. Since the statute constitutes a waiver of the sovereign immunity from suit the jurisdiction thereby granted cannot be enlarged by implication. *United States* v. *Sherwood,* 312 U.S. 584 (1941); *United States* v. *United States Fidelity Co.,* 309 U.S. 506 (1940); *United States* v. *Shaw,* 309 U.S. 495 (1940). Moreover, the assumption by the court below of such jurisdiction is contrary to the policy of Congress to make specific provision for the payment of attorney's fees when it deems the circumstances appropriate and, in doing so, to place monetary or other limitations thereon. While Congress has made provision for payment of certain costs in proceedings under the 1894 Act, it has expressly excluded attorney's fees therefrom.

D. Moreover, imposition and enforcement of the lien would directly contradict the express statutory provision and the policy of Congress with reference to the

restrictions upon the Indians and others in dealing with the property. In legislation enacted both prior to and subsequent to the 1894 Act and its amendment, Congress by specific provision applicable to every possible situation has required that the trust allotments should be preserved for the allottee until the end of the trust period and should not, in any way, be employed to pay debts contracted during that period. The result of imposition of the lien and enforcement thereof is to accomplish a sale of the property and to charge the proceeds not only with debts of the Indian but also with other charges such as the expenses of sale.

The 1894 Act rather than containing any release of these restrictions upon this property clearly indicates that it should be subject to those restrictions. Any implication from the 1894 Act that the guardianship of the United States has been abrogated and administration of the trust delegated to the courts is further denied by the strong policy of Congress to preserve these lands for the Indians. The courts have long recognized and enforced this policy, even to the extent of overriding equities which might otherwise exist in favor of persons dealing with the Indians. The proceedings in the court below which look to immediate and complete liquidation of the Indian lands solely for the purpose of assuring their attorneys of payment of the Indian's debt to them are in direct contradiction of this policy. Not the slightest attempt has been made to preserve the lands for the Indians, but instead the door has been opened for the dissipation of not only the allotments here involved, but also the allotment of any Indian who must seek the aid of the courts in obtaining recognition of his right thereto.

E. The decisions in *United States* v. *Equitable Trust Co.,* 283 U.S. 738 (1931), and *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.C.A. 10, 1944), certiorari

denied 324 U.S. 844, do not support the assumption of jurisdiction by the trial court to impose a lien upon the restricted property. There is nothing in those cases to support the view that by the 1894 Act, wherein Congress authorized Indians to sue to establish their rights to trust allotments, the restrictions imposed for the benefit of the Indians were impliedly relinquished.

II

Since the district court's jurisdiction is strictly limited by the 1894 Act and since there was no fund in court from which payment of attorneys' fees could be enforced, it is apparent that the court was without power to adjudicate any questions as to attorneys' fees. The action under the 1894 Act was a special proceeding and the court was not thereby vested with its traditional general equity jurisdiction.

ARGUMENT

The District Court had no jurisdiction to impress a lien upon the trust patent allotments or to enforce such lien by appointing a receiver or ordering the sale of the property.

I

A. *Introductory—The interest of the United States.* —It is fundamental to an understanding of the issues in this case and the result of the decision below that the interest of the United States in relation to the property be clearly in mind. Because of the relationship between the United States and the Indians, the Government has control of their property. In authorizing the division of the tribal property in severalty, Congress imposed limitations upon the power of the individual to deal therewith. Under the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. sec. 331 and the Mission Indian Act of 1891, 26 Stat. 712, title to individual allotments is held in trust by the United States for the allottees. The management and

control of the property generally is vested in the Commissioner of Indian Affairs and the income from the property is subject to the control of the United States through the Secretary of the Interior, 25 U. S. C. secs. 2, 403. Section 5 of the Mission Indian Act, 26 Stat. 712, provides that upon expiration of the trust period, the United States will convey to the allottee or his heirs "discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." Section 5 of the General Allotment Act of February 5, 1887, 24 Stat. 388, 389, 25 U. S. C. sec. 348, contained like provision in almost identical language. In 1906 the General Allotment Act was amended so as to permit issuance of a fee patent during the trust period with the stipulation that "said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent". Act of May 8, 1906, 34 Stat. 182, 25 U. S. C. sec. 349. About a month later, by the Act of June 21, 1906, 34 Stat. 325, 327, 25 U. S. C. secs. 354 and 410, there was added to the General Allotment Act, the following provisions:

> No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.
>
> That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor during his minority, except with the approval and consent of the Secretary of the Interior.

Thus, Congress by unequivocal language and by provisions applicable to every possible situation provided that the trust allotments should be preserved for the allottee and should not, in any way, be employed to pay debts he contracts prior to receiving fee title.

These provisions are typical of the restrictions upon encumbrance or sale which Congress has imposed upon Indian property whenever it is allotted in severalty. As a result, even though the Indian is the beneficial owner, the United States is vitally interested in any proceedings affecting the property. This interest is the same whether the Indian has fee title subject to restrictions upon alienation or, as in the instant case, the United States holds title in trust for the Indian. As a result, the United States is interested in any proceeding affecting such property even to the extent that it may obtain cancellation of conveyances that have been made in violation of restrictions even though alienation was accomplished by judicial proceedings in which the Indian owning fee title was a party. *United States* v. *Hellard,* 322 U.S. 363, 366 (1944), and cases there cited. The Indian is, however, concluded by proceedings brought on his behalf by the United States. Thus, in the case of Indian allotments, the predominant interest is that of the United States in executing its policy of protecting the Indians against exploitation.

B. *The decision below cannot be reconciled with the decision of this Court on the previous appeal (United States* v. *Arenas, 158 F. 2d 730).*—Upon the previous appeal, the United States argued that attorneys' fees and expenses could not be awarded against the Government. With reference to this argument, this Court stated (*United States* v. *Arenas,* 158 F. 2d 730, 753): "We agree entirely with the appellant's construction of the Act of 1894 [25 U.S.C.A. § 345]." The fact

that the judgment in the instant case does not, in terms, impose liability for such expenses upon the United States but instead imposes a lien upon the property for such charges, does not distinguish the situation. As we have shown (*supra,* pp. 13-15), the United States has a direct and vital interest in the allotted land. Because of such interest, a suit seeking to condemn such land is a suit against the United States, since "A proceeding against property in which the United States has an interest is a suit against the United States." *Minnesota* v. *United States,* 305 U.S. 382, 386 (1939). Likewise, an attempt to impose a lien for certain charges upon land in which the United States has an interest is an attempt to impose liability for those charges upon the United States. This is necessarily so since the only purpose of the lien is to coerce payment of the charges it secures. Similarly, lands which are held by the United States in trust for Indians are not subject to local taxation absence consent of Congress. *United States* v. *Board of Com'rs of Fremont County., Wyo.,* 145 F. 2d 329 (C.C.A. 10, 1944), certiorari denied 323 U.S. 804. In pointing out the reasons why this is so, the court said in *United States* v. *Rickert,* 188 U.S. 432, 438 (1903):

> To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State, is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances.

It is thus clear that imposition of a lien for attorneys' fees would constitute the imposition of liability for such fees upon the United States—a result which this

Court has recognized is not permitted by the 1894 Act. Indeed, because public property is held for public uses and because the means of securing payment of governmental obligations are specifically provided for, it is generally stated that "The granting of liens on public property is against public policy. In fact public policy forbids a lien on public property. Accordingly, in the absence of statutory authorization, no lien can be acquired on property of the Government of the United States, or on property of a state or local governmental authority." 33 Am. Juris., Liens, sec. 14, p. 425. Moreover, equitable liens to secure the payment of attorney's fees can under any view "cover only the interest of the client in the property charged, and are subject to any rights in the property which are valid against the lien at the time the lien attaches." *In Re Gillaspie,* 190 Fed. 88, 91 (N.D. W. Va., 1911). Since the United States has an indivisible interest in the entire property, it follows that a lien could not be enforced without affecting the interest of the United States, and hence it may not be imposed on the property.

C. *The United States in the 1894 Act as amended did not consent to imposition of a lien upon the property to secure payment of attorneys' fees.*—In the 1894 Act Congress provided a means whereby an Indian could litigate his right to an allotment of land. However, Congress did not waive the governmental immunity from suit in respect to all aspects of the restricted allotment. On the contrary, the Act simply authorizes suit to establish the Indian's right to an allotment.[4] It expressly provides that the parties "shall be the claimant as plaintiff and the United States as party defend-

[4] We are not here concerned with the other aspect of the Act relating to suits by the Indian to protect his interest in lands that have been allotted to him. *Gerard* v. *United States,* 167 F. 2d 951 (C. C. A. 9, 1948).

ant". The nature of the judgment to be entered is likewise defined in the provision that "the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him." Thus, the Act strictly limits the nature of the suit, the parties thereto and the judgment to be entered. A claim for attorneys' fees against the Indian plaintiff and imposition of a lien upon the allotment to secure payment thereof is clearly not within the terms of the Act.

Nor may such jurisdiction be implied. This statute is a waiver of the sovereign immunity from suit, and hence the jurisdiction thereby granted cannot be enlarged beyond the express terms of the Act. *United States* v. *New York Rayon Co.,* 329 U. S. 654, 659 (1947); *United States* v. *Hotel Co.,* 329 U. S. 585, 590 (1947); *United States* v. *Sherwood,* 312 U. S. 584, 590 (1941); *United States* v. *Goltra,* 312 U. S. 203, 210 (1941); *United States* v. *United States Fidelty Co.,* 309 U. S. 506 (1940). The *Sherwood* case is particularly apt here. The court there held that the creditor of a claimant against the United States could not prosecute a claim under the Tucker Act, joining the United States and his debtor as defendants, pointing out that (312 U. S. at p. 586) "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit" and (312 U. S. at p. 591) "that consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government." The 1894 Act presents a much clearer situation in view of the express provision that the parties shall be "the claimant as plaintiff and the United States

as party defendant". Clearly, it did not embrace claims by white men against the Indian plaintiff.

Although recognizing that consent should be strictly construed, the court below stated that "once given that consent is to be liberally construed to effectuate that purpose" (R. 60). For this view, it cited *United States* v. *Shaw,* 309 U. S. 495 (1940), apparently meaning the language at page 501 that:

> Special government activities, set apart as corporations or individual agencies, have been made suable freely. When authority is given, it is liberally construed.

That the court below misconceived the effect of the *Shaw* decision is apparent from the fact that on the page following the above-quoted matter, the Supreme Court reiterated the rule of strict construction, stating (p. 502):[5]

> It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress.

The view of the court below that jurisdiction of claims for attorneys' fees to be paid out of the allotted land was necessarily granted in order to effectuate the purpose of the statute was presumably based on the idea that, absent such jurisdiction, the Indians could not secure attorneys (R. 60, 116). But such a question is a matter of policy to be addressed to Congress and does not warrant enlargement of the consent beyond

[5] It is obvious from the complete context of the *Shaw* decision and the cases cited (*Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U. S. 381 (1939), and *Federal Housing Administration* v. *Burr,* 309 U. S. 242 (1940)) that, in the extract of the opinion relied upon by the court below, the court was referring to the fact that when, in the case of Government corporations, a general consent to sue and be sued has been given, limitations thereon will not be implied. See *Reconstruction Finance Corp.* v. *Menihan Corp.,* 312 U. S. 81 (1941).

its terms. Cf. *Arenas* v. *United States,* 322 U.S. 419, 432 (1944). Where Congress has believed that provision for payment of attorneys should be made, the consent statute has contained explicit provision therefor. See e.g., Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70(n); Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 846, 28 U.S.C. sec. 2678; Act of March 4, 1925, 43 Stat. 1302, 1311, 38 U.S.C. sec. 551 (World War Veterans' Act); Act of May 20, 1924, 43 Stat. 133, 134. More important, Congress does not simply authorize the payment to attorneys of any amount which the court may determine. On the contrary, particularly in cases relating to Indian claims, the maximum amount which a court may award to attorneys has been strictly limited, usually to 10 per cent of the amount recovered. Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. sec. 70(n); Act of October 1, 1890, 26 Stat. 636, 637; Act of June 22, 1910, 36 Stat. 580, 581; Act of May 26, 1920, 41 Stat. 623, 625; Act of June 28, 1938, 52 Stat. 1209, 1211; Federal Tort Claims Act of August 2, 1946, 60 Stat. 842, 846, 28 U.S.C. sec. 2678; World War Veterans Act of March 4, 1925, 43 Stat. 1302, 1311, 38 U.S.C. sec. 551. With this background, it is clear that if Congress had intended that attorney's fees should be guaranteed it would have made some specific provision therefor in the 1894 Act with such limitations as it deemed appropriate for protection of the Indians. "* * * it would have been easy to have said so in express terms." *United States* v. *Hotel Co.,* 329 U.S. 585, 590 (1947).

Indeed, the policy of Congress with respect to suits under the 1894 Act is apparent from the fact that from 1909 to 1921 specific appropriations were made for the payment of court costs, witness fees and other expenses "incurred in suits instituted in behalf of or against

Indians involving lands allotted to them" but it was expressly provided "that no part of this appropriation shall be used in the payment of attorney's fees". Act of March 3, 1909, 35 Stat. 781, 784.[6] Thus, Congress, while recognizing that the policy of the Act required it should make provision for the payment of certain litigation expenses of the Indians, excluded attorney's fees. Plainly, the court below was not warranted in concluding that such a necessity for guaranteeing attorneys' fees existed so as to require an implication of jurisdiction to award such fees.

D. *The decision below is in direct contradiction to the limitations imposed by Congress upon alienation of the property.*—In the instant case, the judgment purports to impose a lien upon the restricted allotment and reserves jurisdiction to make orders for enforcement thereof. In *United States, et al.* v. *Preston, et al.*, No. 12,218, now pending in this Court, such enforcement proceedings have taken the form of a direction that the property be sold, a deed to be executed by the Commissioner appointed to conduct the sale and his expenses to be deducted from the proceeds thereof. Such relief was requested in the instant case by the appellees (R. 12), who also requested appointment of a receiver to collect the income. Thus, the power asserted is to sell the property; to charge it not only with an obligation of the Indian, but also for other charges such as the expenses of sale; to physically seize the property by means of a receiver and to dispose of its

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[6] See also the Acts of April 4, 1910, 36 Stat. 269, 272; March 3, 1911, 36 Stat. 1058, 1061; August 24, 1912, 37 Stat. 518, 520; June 30, 1913, 38 Stat. 77, 80; August 1, 1914, 38 Stat. 582, 585; March 4, 1915, 38 Stat. 1228; May 18, 1916, 39 Stat. 123, 126-127; March 2, 1917, 39 Stat. 969, 972; May 25, 1918, 40 Stat. 561, 566; June 30, 1919, 41 Stat. 3, 7; February 14, 1920, 41 Stat. 408, 412; March 3, 1921, 41 Stat. 1225, 1229.

income. The existence of such a power is denied by the express provisions applicable to this land pursuant to the general policy of Congress. The land cannot be liable "to the satisfaction of any debt contracted prior to the issuing the final patent in fee therefor". Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. sec. 354; see also Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. 349, *supra,* p. 14. Nor may any money accruing from the lease of such property be used for such purpose without the consent of the Secretary of the Interior. Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. sec. 410. Both the Mission Indian Act and the General Allotment Act provide that any attempted conveyance "shall be absolutely null and void" (see *supra,* p. 14). And it is obvious that if the actions of the court below were sustained, the United States could not perform its promise to convey this land to Lee Arenas at the end of the trust period "free of all charge or incumbrance whatsoever" (see *supra,* pp. 14, 15-16). A clearer case of conflict with specific congressional prohibitions cannot be imagined.

The only possible justification for the assertion of the powers assumed by the court below would be that the 1894 Act has effected a release of all such statutory limitations upon the allotments and has transferred to the court complete power to administer the trust as to these particular lands. There is, of course, no language in the 1894 Act indicating such an intent. Plainly, such a result cannot be implied simply from the fact that the Act authorized the Indians to bring suit against the United States.

The implication found by the district court is denied by the express provision of the 1894 Act. The result reached is that whenever any Indian brings suit, rather than simply receiving his patent from the Secretary of the Interior, the restrictions are inoperative. But,

since the Act provides that the judgment shall have the same effect as if the allotment had been approved by the Secretary, it is clear that the same restrictions apply in both cases. And even if the Act were less specific, the implication would not be permissible because the statute constitutes a waiver of governmental immunity, and hence may not be enlarged by implication beyond its plain language (see *supra,* pp. 17-21). In this connection it should be noted that this Court has recognized that the 1894 Act did not vest in the courts a power to review generally the actions of the United States in executing its guardianship over the Indians. In rejecting such a construction in *United States* v. *Eastman,* 118 F. 2d 421, 423 (C.C.A. 9, 1941), it was stated:

> It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed.

See also *Arenas* v. *United States,* 322 U.S. 419, 432 (1944).

More important, however, is the fact that the decision below flies in the face of the fundamental policy established by Congress in dealing with its Indian wards. The policy was asserted by Congress both before and after the 1894 Act in the most explicit terms and has been rigorously enforced by the courts. *Heck-*

man v. *United States,* 224 U.S. 413 (1912); *United States* v. *Rickert,* 188 U.S. 432, 437-438 (1903); *Monson* v. *Simonson,* 231 U.S. 341, 345-347 (1913). The cornerstone of this policy is that the land allotted to the Indian shall be preserved until he is capable of its management and control and the trust is terminated. See *Monson* v. *Simonson,* 231 U.S. 341, 345 (1913). This policy is so strong that it overrides the usual equitable provisions between private parties. For example, while a return of the proceeds is ordinarily required as a prerequisite to cancellation of an unauthorized sale or mortgage, no such requirement applies when the restrictions upon Indian lands have been violated, because to do so would "frustrate the policy of the statute." *Heckman* v. *United States,* 224 U.S. 413, 447 (1912). Again the ordinary rule that a conveyance with warranty estops the grantor when he afterwards acquires the land does not apply when an Indian conveys while restrictions are in force. *Starr* v. *Long Jim,* 227 U.S. 613, 625 (1913). Similarly, doctrines of estoppel, ratification or laches cannot be applied so as to thwart this public policy. *American Surety Co.* v. *United States,* 112 F. 2d 903 (C.C.A. 10, 1940). It is absurd to suppose that Congress by the 1894 Act intended to abandon its guardianship as to any Indian who should bring suit under the Act, thus permitting the Indian to secure a release of restrictions contrary to the policy of protecting the Indian against his own improvidence or the impositions of others. There certainly was no intention that, as in cases like the Palm Springs Reservation where many Indians brought suit, substantially all of the lands should immediately pass to other ownership by means of judicial sales to satisfy attorney's fees or other charges.

The actions taken by the district court in this case and the companion case of *United States* v. *Preston,*

No. 12,218, show conclusively that this strong policy of Congress has been completely ignored and no attempt has been made to preserve the allotment for the Indians. The judgment determines the amount of fees payable only as a percentage of the unascertained value of the land and hence the amount of money needed to satisfy it does not appear. Since the amount is not determined there is, of course, no showing that Arenas is unable to pay it. Again, there is no showing that the property will be dissipated or wasted. In the companion case the court has simply ordered a sale of the entire allotment of the Indians. No attempt was made to work out some solution whereby the fees could be paid within a reasonable period of time from income from the property or otherwise without requiring its sale. Finally, although the allotments embrace three separate and distinct types of land, no effort was made to sell just enough land to pay the fees but rather the court ordered sale of all the lands allotted to Eleuteria Brown Arenas. These actions all demonstrate that not the slightest consideration has been given to the policy that these lands should be preserved for the Indian, but rather the sole consideration seems to have been that the attorneys shall receive their fees immediately. A clearer case of thwarting the policy of Congress could hardly be imagined.

Finally, it should be noted that not only does the judgment below award Lee Arenas' former attorneys 22½% of the allotment, but his first attorney upon this appeal was awarded $4960.98, which was made a lien upon the allotment, and undoubtedly his present attorney will likewise claim a similar right. Thus, the allotment is rapidly being dissipated and, in view of the losses which necessarily accompany a forced sale of property, it is evident that the prime purpose of the restrictions will be frustrated. Once the door is open,

it is not improbable that within a short time all of the Indians' lands will be gone and the United States will again have to make some provision for them.

It is inconceivable that Congress could have intended such a result in enacting a statute which was obviously designed to benefit the Indians. The fact that unrestricted property of the Indian might be available for payment of attorney's fees and the fact that the Secretary of the Interior might use some of the proceeds from the allotment for such purpose would seem to constitute adequate provision for their payment. Certainly appellees are entitled to no more, since, in view of the restrictions upon the allotment, they had ample notice that the allotments could not be used for such purposes. In this connection it should be noted that enforcement of the restrictions for the benefit of the Indians often produces hardships upon persons unaware of the restrictions (see *supra,* p. 24). As the court said in *United States* v. *Gilbertson,* 111 F. 2d 978, 980 (C.C.A. 7, 1940):

> In view of the body of authority thus outlined above, it appears that the undoubted equities of appellees who paid full consideration for the land twenty-three years ago and have since made improvements upon it in total ignorance of the extension of restrictions against its alienation, may not prevail in this action by the Government to restore to its Indian wards the land allotted to their grandfather.

E. *The cases relied upon by the court below do not support its assumption of jurisdiction in the instant case.*—The court below relied upon *United States* v. *Equitable Trust Co.,* 283 U.S. 738 (1931), and *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.C.A.

10, 1944), certiorari denied 324 U.S. 844.[7] Neither of these cases involved the scope of jurisdiction in an original suit against the United States, but in both the United States was in the position of a plaintiff seeking relief. This distinction is basic. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134 (1938). As has been shown, in a suit against the United States the court's power is strictly limited by the jurisdictional statute. However, when the United States invokes the jurisdiction of a court as plaintiff, it is, with exceptions growing out of consideration of public policy, subject to the same rules of law as apply to individuals and, again with the possibility of exceptions, must be ready to do equity. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 134-135 (1938); *McKnight* v. *United States,* 98 U.S. 179, 186 (1878); *Brent* v. *Bank of Washington,* 10 Pet. 596, 614-615 (1836). Cf. *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 409 (1917); *Causey* v. *United States,* 240 U.S. 399, 402 (1916); *Heckman* v. *United States,* 224 U.S. 413, 446-447 (1912).

In addition, the power of an equity court to make an allowance for attorney fees depends upon there being within the control of the court a fund from which payment might be made. In the *Equitable Trust* and *Anglin & Stevenson* cases there was such a

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[7] The court also referred to *Sprague* v. *Ticonic Bank,* 307 U.S. 161 (1939), for a general discussion as to the power of an equity court to tax costs between attorney and client (R. 60-61). However, the court recognized that this was not a *Ticonic Bank* case (R. 61), since that case involved contribution for expenses of litigation from others who would benefit from a common fund established by the successful plaintiff. The Government on this appeal does not seek to impeach the *Ticonic Bank* case, but, as does the court below, thinks it of little weight here, and further considers it distinguishable at least on the same grounds as the *Equitable Trust* and *Anglin & Stevenson* cases.

fund available, i.e., moneys which could be expended only with the approval of the Secretary of the Interior but which nonetheless could be used to pay debts of the Indian, including the expenses of the litigation from which he benefited. Thus, the question in those cases was whether under the circumstances there presented, the approval of the Secretary of the Interior was necessary before the funds could be so used. In the instant case, there is not such a fund. The restricted allotments cannot be so treated because they cannot become liable to the satisfaction of debts (Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. sec. 354, *supra* p. 14), and, therefore, cannot be used for payment of attorneys' fees. The allotments cannot in any sense be considered to be within the court's jurisdiction for such purposes, since the 1894 Act conferred jurisdiction only to determine the claim to an allotment and then to certify its judgment to the Secretary of the Interior. The land itself was not placed in the custody or control of the court. Cf. *Hoffman* v. *McClelland,* 264 U.S. 552, 558-559 (1924).

Neither the *Equitable Trust* nor *Anglin & Stevenson* cases involved an attempt to imply a release of all restrictions from an act similar to the 1894 Act. In the *Equitable Trust* case it was concluded that payment of attorney's fees would not violate the restrictions upon Indian property because the United States had consented to the payment of such fees. That proceeding had been originally commenced by suit in the name of Barnett by his next friend to recover funds which were physically possessed by the defendants. As the court pointed out (283 U.S. at p. 745), the intervention of the United States was not to supplant the next friend and was in recognition of a right to deduct reasonable expenses of the litigation. No such circumstances are presented here.

Similarly, in the *Anglin & Stevenson* case the court found a consent of the United States in two circumstances; first, the fact that under the Act there involved, Act of April 12, 1926, 44 Stat. 240, the judgment bound the United States "to the same extent as though no Indian lands were involved"; and second, that the United States had invoked the jurisdiction of the court to determine the heirs of Jackson Barnett. See *Anglin & Stevenson* v. *United States,* 160 F. 2d 670 (C.C.A. 10, 1947), certiorari denied 331 U.S. 834 (1947), which shows that even when governmental consent has been given the result is not the same in all particulars as it would be between private parties.

Indeed, the *Anglin & Stevenson* cases support the Government's view in the instant case that the award of attorney's fees is "a judgment against the United States" (160 F. 2d at p. 673), and hence can only be justified if Congress has expressly consented to such a judgment. As this Court has already held and as we have heretofore demonstrated, no such consent can be found in the 1894 Act.

II.

The District Court had no jurisdiction to entertain a petition for allowance of attorneys' fees under the Act of 1894 as amended.

It does not appear that there are present grounds of federal jurisdiction such as diversity of citizenship, etc., so that the court below would have jurisdiction of an independent action brought by appellees against Lee Arenas. Thus, the only possible basis for jurisdiction of the federal district court in the instant case is the 1894 Act as amended. The court below reasoned that the Act constituted a consent of the United States to the invocation of general equity jurisdiction including the authority to tax costs between solicitor and client (R. 59-60).

We have demonstrated in point I that such reasoning is erroneous in that the United States has not consented to the imposition of a lien upon the allotment to secure payment of such fees nor to enforcement of such lien by sale or otherwise. For the same reasons, it is clear that the 1894 Act did not vest in the court jurisdiction to make any adjudication concerning attorneys' fees. As we have shown (*supra,* pp. 17-21), the statute makes no mention of attorneys' fees and cannot be extended by implication to cover such matters since it must be narrowly construed. And since there was no fund in court which could be applied to the payment of attorneys' fees (*supra,* pp. 27-28) there is no occasion for invoking the principle that once equity has jurisdiction of the parties and the subject matter it will settle all disputes between the parties. Moreover, the 1894 Act created an entirely new form of proceeding which did not therefore exist either as common law or equity jurisdiction. *Young* v. *United States,* 176 Fed. 612, 614 (C.C. W.D. Okla., 1910). Such statutory actions are generally referred to as "special proceedings", and the statutory remedy can be invoked only to the extent and in the manner prescribed by the legislature. *Galveston, H. & S. A. Ry. Co.* v. *Wallace,* 223 U.S. 481, 490 (1912); *United States* v. *Smelser,* 87 F. 2d 799, 801 (C.C.A. 5, 1937); *Western Fruit Growers* v. *United States,* 124 F. 2d 381, 387 (C.C.A. 9, 1941). The special nature of a proceeding under the 1894 Act is apparent not only from the limitations as to the parties and subject matter (see *supra,* pp. 17, 18) but also from the nature of the judgment to be entered. The court is not empowered to quiet title to the land or to issue a patent to the plaintiff. Its judgment simply establishes the right to an allotment "the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and

approved by him." Thus, rather than vesting in the court general equity jurisdiction to make a judgment transferring title to the land, the Act merely permits the court to determine the right to an allotment leaving it to the Secretary to issue the patent. *Hy-Yu-Tse-Mil-Kin* v. *Smith,* 194 U.S. 401, 413-414 (1904). The 1894 Act does not, therefore, vest in the court general equitable jurisdiction over the subject matter. Even when, as in the Tucker Act, courts are given jurisdiction over claims based upon equitable or maritime principles as well as upon legal demands, the courts have no jurisdiction to apply equitable remedies such as specific performance. *United States* v. *Jones,* 131 *U.S.* 1 (1889).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed with directions to dismiss the petition for allowance of attorney fees.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

JAMES M. CARTER,
United States Attorney,
Los Angeles, California.

IRL D. BRETT,
Special Assistant to the Attorney General,
Los Angeles, California.

ROGER P. MARQUIS,
JOHN C. HARRINGTON,
Attorneys, Department of Justice,
Washington, D. C.

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APPENDIX

Section 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713, provides as follows:

> That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

Section 5 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U.S.C. 348, provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such

allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

Section 6 of the General Allotment Act as amended by the Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. sec. 349, provides:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law * * * *Provided,* That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further,* That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: * * *

The Act of June 11, 1906, 34 Stat. 325, 327, 25 U.S.C. secs. 354 and 410, adds the following provisions to the General Allotment Act:

> No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.
>
> That no money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

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